United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1158

To be argued by
STANLEY A. TEITLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1158

B P/S

UNITED STATES OF AMERICA,
Appellee,

—against—

ARONA[illegible]ARY DIOP,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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STATUTE CITED

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Preliminary Statement

Arona Fary Diop appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Dooling, *J.*), entered March 26, 1976, which judgment convicted him, after a jury trial, of a four count superseding indictment charging him with importation of, and possession with intent to distribute, opium and hashish, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and 841(a)(1). Appellant was sentenced to three years imprisonment and a special parole term of three years on each count, the sentences to run concurrently. He is presently incarcerated pending this appeal.

The sole issue raised by appellant on this appeal is whether the District Court committed reversible error by

not instructing the jury as to the voluntariness of appellant's admissions after they were received in evidence pursuant to the rule of *Harris* v. *New York*, 401 U.S. 222 (1971).

Statement of the Case

1. The Government's Direct Case

Diop's Travels

On October 26, 1975, appellant Arona Fary Diop, a citizen of Senegal (Tr. 108-109),[1] traveled from the United States to Nepal by way of Delhi, India (T. 113). Less than one week later, on November 1, 1975, appellant departed from Nepal and, following a three hour stopover in Rome, arrived in Abidjan, Africa (T. 261-62). On November 5, 1975, in Abidjan, appellant boarded Pan American World Airways ("Pan American") flight #187 destined to reach John F. Kennedy International Airport ("JFK") the following day after a brief stop in transit at the city of Dakkar on the African continent (T. 110, 129). Located in the cargo hold of flight #187 was part of appellant's baggage—a crate, to the naked eye filled with African artifacts, but actually concealing in its false bottom one hundred twenty-one pounds of opium, hashish and marijuana (T. 91, 101).

The Underweighed Shipment

On the evening of November 6th, Matias Rodriguez, a Pan American employee working in its JFK cargo de-

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[1] Numbered references preceded by the letter "T" are to the trial transcript. Numbered references preceded by the letter "S" are to the transcript of the suppression hearing held on December 22, 1975. References in parentheses preceded by "3/10" refer to the transcript of a hearing held on March 10, 1976.

partment, was informed through a series of cables transmitted by Pan American in Dakkar that he should be on the lookout for appellant's shipment (T. 115, 123, 147, 149). The airwaybill originally issued by Air Afrique to appellant erroneously reflected a cargo weight of 150 kilograms (T. 115, 123). Cargo handlers in Dakkar had boarded the cargo holds of flight #187 to store the luggage of the Dakkar passengers and during routine cargo movement had noticed that appellant's crate appeared to be much heavier than its stated weight (T. 129-31, 149-150). Rodriguez was ordered to investigate the discrepancy (T. 149-150). Upon weighing appellant's crate when it came off flight # 187, Rodriguez found it to be 270 kilograms[2] (*Id.*).

Diop's Attempted Retrieval of His Narcotics and His Arrest

Diop returned to J.F.K. to pick up his shipment during the late afternoon on Friday, November 7. At 4:15 P.M. he approached Gerard Brady, the general manager of and customs house broker for Continental Air Cargo, Inc. ("Continental") (T. 9-10) and established his identification by displaying his New York State driver's

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[2] The total weight of the concealed narcotics was 55 kilograms, less than half the discrepancy of 120 kilograms. At trial the Government suggested that the weight inaccuracy recorded on the airwaybill was not, as the defense in part contended, the result of some mysterious person secreting $174,000 worth of narcotics (T. 297) into a stranger's well constructed crate (T. 55, 66), but rather that appellant deliberately declared the shipment at the lower weight in order to save additional shipping charges. (T. 55, 66, 297).

If, indeed, the drugs had been the work of a mysterious third person's chicanery and if they were "slipped in" as the defense argued, the weight of the crate would have been 143 pounds less than it actually was.

license (T. 15). Brady specifically recalled the incident since ordinarily his business was handled telephonically and through correspondence, with only three customers per week actually visiting his establishment (T. 10-11). Diop, known in the trade as a "stray" or "walk-in", appeared at Continental at a time when Brady was anxious to leave the office for the weekend (T. 11). After soliciting Brady's help by noting "I need a broker, can you help me out?", Diop then handed Brady his documents for processing, consisting of three carrier's certificates, copies of an airwaybill and two invoices (T. 12). While Brady prepared the import documentation, he engaged Diop in a six to eight minute conversation, inquiring as to the nature of the shipment (T. 20). Responding in English as he did throughout the transaction, Diop, who also spoke French, explained that his goods were musical instruments and that "I have drums in there." (T. 12). Brady, continuing his informal inquiry, asked Diop his purpose in transporting the instruments. Diop responded: "I need it (sic) for a gig tomorrow night in Harlem." (T. 12).

The invoice, dated November 6, 1975, consigned the African art from Danel Gallery, Abidjan, Ivory Coast, to appellant and recited its value in Ivory Coast currency at 1,002 francs CFA, equivalent to $469 American dollars (T. 13-15). After converting the figures, Brady immediately prepared an invoice delineating his charges, which included the price for duty, the bond and various service charges (T. 15-16). He showed the document to appellant, explained the rate of duty as 8½ per cent of the invoice value of the instruments and, likewise, showed appellant the single entry bond (T. 16-17). After explanation, Brady informed appellant that "it would run you about 125 bucks. . . ." (T. 17). Appellant said "O.K.", paid Brady $125.36 in cash and in return Brady handed appellant U.S. Customs Form 7501, a consumption entry form which detailed the relevant facts of the importation (T. 17-18). Subsequently, Continental

issued its "pick up" order which was deemed by Customs sufficient proof that the documentation withstood examination by a licensed broker and also identified the authorized individual to claim the shipment (T. 18-20). The "pick up" order issued to appellant noted that the goods were "270 kilos one piece instrument." (T. 20). Brady himself never weighed the crate, but obtained the weight figure from the carrier's certificate which had been corrected by Rodriguez (T. 24, 122-23).

2. Diop's Post Arrest Admissions[3]

The documents now prepared, Diop proceeded to the customs inspection room in the Pan American cargo building to pick up his shipment which was awaiting its retrieval in a restricted area. (117). There he met United States Custom Inspector Charles Grabbatin and handed to him the documents that had been prepared by Brady (T. 44-50).

A Pan American employee then opened the shipment for the inspector, a procedure taking some six to seven minutes (T. 59). Grabbatin proceeded to examine the merchandise, noticed the poor cobwebbed condition of the goods, and removed the African musical instruments one

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[3] Statements of Diop which were admitted in the Government's rebuttal case are discussed at this point in the brief to aid in understanding appellant's testimony. At a suppression hearing held immediately prior to trial on December 22, 1975, the defense challenged the Government's right to introduce appellant's post-arrest admissions. The Court found, "with great reluctance," that sufficient doubt had been raised as to Diop's understanding of English to justify exclusion of his admissions. Therefore, Judge Dooling held that any statements of the appellant made following the discovery of the narcotics could not be introduced by the Government in its direct case. As will be seen *infra*, appellant anticipated the Government's rebuttal. (131-135). See also Appellant's Appendix at D.

by one (T. 59-60). Diop acknowledged that he owned the crate (T. 78). Once the crate had been emptied, Grab- and exterior bottom (T. 64). Grabbatin's suspicions now batin noticed a discrepancy in height between its interior aroused, the crate was turned over, the piece of wood sealing its bottom was removed, and the false bottom, later found to contain opium, hashish and marijuana (91, 101) and professionally lined in such a manner as to prevent any odor of narcotics from seeping out and water from seeping in, was discovered (T. 65-66).

Prior to the arrival of agents of the Drug Enforcement Administration (DEA), Inspector Grabbatin appropriately informed appellant that he was under arrest. (T. 249). Appellant acknowledged that he understood. (*Id.*). Grabbatin then read to appellant his *Miranda* rights from a standard government card issued for this purpose and Diop stated that he understood his rights. (*Id.*). During the course of subsequent conversation Diop referred to his crate containing the narcotics and proclaimed to Grabbatin that he thought it was a "good job" (T. 253).[4] No other statements were made by appellant to the Customs Service.

DEA Agents Joseph Giaimo, John Huber, Thomas Sharkey and Lester Tuell, responding to a call from Customs, arrived at the Pan American Cargo Building at approximately 5:45 P.M. (T. 88, 104). Agents Giaimo and Huber immediately identified themselves to appellant (T. 237, 268) and Giaimo advised him that he was under arrest for smuggling narcotics. Giaimo then gave Diop his *Miranda* warnings in the same fashion as Inspector Grabbatin had. (T. 236). Appellant on four occasions

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[4] This statement was not offered at trial as evidence of its truth nor were the post-arrest statements which follow here in the text. As noted *infra*, each is recorded here merely to place them in their appropriate context.

acknowledged understanding his rights and all conversations between the agents and Diop were conducted in English (T. 236, 239, 270).

Responding to the agents' questions, appellant readily admitted ownership of the shipment and knowledge of its drug content (T. 239, 270). Appellant specifically stated that he knew the shipment contained marijuana and hashish, that he had purchased the narcotics in Nepal and had subsequently arranged shipment from Nepal to Africa and thereafter to the United States. Appellant further disclosed that it was his intent to exclusively distribute the drugs within the confines of New York and that he had no joint venturers in the future distribution (T. 239). Appellant explained that he arrived at the airport by taxi and that his plan encompassed renting a truck to haul his contraband (*Id.*).

DEA Agent Huber explained to the jury that appellant's crate had contained approximately 900 grams of opium, 70 pounds of hashish and 60 pounds of marijuana. The approximate weight of these drugs was 55 kilogram and they had a wholesale value between $108,000 and $174,000 (T. 297).

3. The Defense Case

Appellant testified in his own defense. He confirmed that he understood "some" English but emphatically denied that the crate in question was the original in which his artwork was transported to this country (T. 199, 203, 216). Appellant did, however, acknowledge ownership of the art content of the crate but, quite naturally, refused to admit having placed the extensive quantity of narcotics in the false bottom (T. 203). According to appellant, the primary purpose of his many worldwide travels, as reflected in his passport, was solely to

purchase primitive works of art (T. 204). In an attempt to persuade the jury to infer that no drugs were purchased by him in India, appellant proffered the explanation that while in transit from India to Abidjan his flight landed in Italy and it was there that his entire luggage was inspected by the appropriate border officials without incident (204-205). In short, appellant attempted to make fiction out of any conceivable notion that Nepal was the first stage of his illegal smuggling plot.

Appellant thereafter recounted the events of November 7, 1975. At first he testified that he *never* spoke English with either Agents Grabbatin, Giaimo or Huber (T. 206). Subsequently appellant stated that he merely gestured to Agent Grabbatin, but did speak a bit of English (T. 207). In direct contrast to the Government agents' testimony, appellant's version was unique on its facts. He stressed that Grabbatin told him to sit in a chair, then left the room, and returned notifying appellant that his "box" was ready (T. 207-208). Afer accompanying appellant, Grabbatin then inquired of him "is this box yours", to which appellant purportedly respnoded "No. This is not mine" (T. 209). Appellant, supposedly spontaneously, told Grabbatin that someone had made a mistake since his name did in fact appear on the box (*Id.*). Thereafter, appellant claimed only the artwork in the crate by noting "This is mine" (*Id.*). Appellant claimed that he then demanded the production of the appropriate papers to sign so as to retrieve his art but then he was directed to another office (*Id.*). Ten minutes later a policeman "grabbed " appellant's shoulder and escorted him to another office. Appellant throughout the course of his arrest supposedly told the authorities that what they were doing was not "correct". Diop allegedly asked the agents to explain their actions but they made no attempt to either understand him or explain. At this point Diop recognized that "something

wrong was happening". Another agent transported him to another room and explained the nature of the events. Again, appellant denied knowledge of importation of the drugs (T. 209-212).

On inquiry as to why he had paid in excess of $1,000.00 (air fare and customs duties) to import his art which he himself only valued at $469.00, appellant responded that he could not realistically estimate the true value of the art and that the selling price depended upon what he could get from his clients (T. 213-15).

Appellant denied ever having offered admissions to Agent Giaimo or any other agent (T. 215). He denied use of the word "gig" to Brady and protested that not only had he never heard the word before but he did know its meaning (T. 216-17). He further testified that the crate in evidence did not even look like the one he shipped (T. 218).

Cross-examination revealed that notably absent from appellant's passport was an entry from Italy (T. 221). Appellant, a New York State driver, drove frequently here (T. 221), and had a New York savings account from which he made withdrawals and into which he deposited sums of money (*Id.*). In the summer of 1975, he lived at 149 East 69th Street in Manhattan and negotiated and executed a lease for a monthly rental of $270.00 (T. 221-22). He admitted to having signed the extensive importation documents all written in English and to having signed the United States Customs entry forms (T. 224). Inside appellant's passport was a card with a notation regarding "neutralizer" and "conditioner" (T. 224-25). Diop denied any understanding of the meaning of these words despite the fact that the card was found on his person and carried by him across thousands of miles (T. 225). He admitted leaving Africa

on the 5th of November and arriving in New York on the 6th (T. 225-26). He acknowledged passing an English entry test at Columbia University and having been enrolled in an intermediate English course there (T. 226-27). He also admitted having spoken English in India and Nepal (T. 228). He denied understanding Brady and claimed he did not know what he was signing (T. 230). Again, when the agents questions and his responses were specifically recited seriatim by the prosecutor, appellant denied that any statements were made by him to the agents pertaining to his ownership of the crate's drugs or that he thought he did a "good job" (T. 231-233).

Tony Archer, former owner of a primitive art gallery, claimed that he knew appellant for one year during which time they engaged in five business transactions, all of them a few months apart (T. 180-81). Appellant mostly spoke in his native tongue but on occasion communicated with Archer in a little mixture of French and English (T. 181-82). Both appellant and Archer characteristically only spoke English when they were discussing prices (T. 183). Archer admitted on cross-examination that appellant never had a gallery, never used any documentaton other than a simple handwritten invoice and never transacted business with anyone in Archer's gallery other than him (T. 184-86).

Stephen Glantz, appellant's travel agent and a United States Citizen, confirmed that for three years he had been able to communicate with appellant in English and French (T. 188-89). Diop sold African art to Glantz on at least six occasions but met with him approximately fifteen times (T. 190). The purpose of Glantz' purchases was solely to enhance his private collection (T. 188-90).

Cross-examination revealed that Glantz sometimes paid appellant American money either at his own gallery or at appellant's apartment (T. 193). Neither

appellant nor Glantz ever prepared a bill of sale (T. 193-94). The sole paper used by appellant in his alleged sales to Glantz was an insurance letter placing a value on the art (*Id.*). These type of letters, tendered to Glantz on Diop's own accord, were always written by appellant in English (T. 184). While Glantz claimed that he met appellant through a mutual friend, he recalled neither his name nor his address (T. 195). It was Glantz who arranged for the November, 1975 trip to India and Africa (T. 196). Appellant never paid Glantz and all of the required funds were advanced by Glantz (T. 196-97). Appellant always paid in cash and never by personal check (*Id.*). Obviously, as a result of Glantz' testimony the jury was entitled to infer that he was Diop's financeer in drug trafficking.

4. The Government's Rebuttal Case

Introduction of Diop's Post-Arrest Admissions

In his direct testimony, Diop stated that he had shipped the African musical instruments in a crate other than the one produced at trial (203). He denied having purchased narcotics in Nepal (205) or secreting narcotics into a crate (204). Diop further denied making any admissions of guilt to Government agents (210-212, 215).

For the purpose of attacking the credibility of the appellant, the Government, in its rebuttal case, intro-

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[5] As stated *supra* in his statements to Agent Giaimo, Diop acknowledged ownership of the crate and admitted knowledge that it contained narcotics. He further admitted to having purchased the narcotics in Nepal, having shipped them to Africa and the United States and further admitted his intent to distribute them in New York.

duced the admissions of Diop to Agents Giaimo[5] and Inspector Grabbatin,[6] *supra* at 5-7.

5. The Defense Motions

The defense motion for a judgment of acquittal, made following the close of the Government's case (159), was denied. The Court stated that the Government's proof of knowledge was sufficient to take the case to the jury (163).

The defense motion for a directed verdict of acquittal, made following the close of the taking of testimony (277), was likewise denied. The Court held that a jury would not be unreasonable in finding appellant guilty beyond a reasonable doubt (277-287). Following conviction by the jury, the defense moved to set aside the verdict as against the weight of the law and evidence. The Court denied its motion by referring to its previous findings (351-352).

Prior to sentencing, the defense moved for a new trial based on "newly discovered evidence." It claimed that DEA agent Thomas Sharkey, who was not produced at trial, had told United States Magistrate Max Schiffman at Diop's arraignment that Diop could not speak English and would require an interpreter. A hearing was held on the motion on March 10 and 19. The testimony of Agent Sharkey (3/10, 4-11), Magistrate Schiffman (3/10, 25-39) and AUSA Elia Weinbach (3/10, 19-28) contradicted the allegations of the defense. The Magistrate, as well as the other witness, denied that either Diop or Sharkey ever made such a statement. On March 23, the Court denied the motion finding the evidence insufficient to set aside the verdict.

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[6] As noted *supra*, Diop referred to the crate as a "good job". (253).

ARGUMENT

The District Court accurately instructed the jury on the proper evidentiary use of appellant's post-arrest statements.

Appellant contends that Judge Dooling failed to properly instruct the jury concerning the voluntariness of his post-arrest statements which were admitted in the Government's rebuttal case, thus, allegedly committing plain error within the meaning of *United States* v. *Barry*, 518 F.2d 342 (2d Cir. 1975) and 18 U.S.C. § 3501.

We submit that the requirements of 18 U.S.C. § 3501 and the rule of *Barry* do not apply to the case at bar. Indeed, although the statute reads in terms of "voluntariness" and deals with confessions and other incriminating statements, obviously its proscriptions, as reflected in *Barry*, apply to a much narrower category of cases—those in which a confession is the product of coercion and is offered solely to prove guilt. In Diop's case there was no evidence of any inherently coercive tactics from the nature of the Government questioning. In fact, at no time during the trial or the suppression hearing did Diop so claim. Judge Dooling ruled that Diop's statements were originally inadmissible not because they were the result of duress or coercion, express or implied, but because Diop lacked the knowledge of his right to refuse to answer. The underlying purposes of *Barry*, as applied to this case and viewed within the framework of *Harris* v. *New York*, 401 U.S. 222 (1971) and *Oregon* v. *Hass*, 420 U.S. 714 (1975), yield no other conclusion but that the *Barry* Court intended to limit its holding to coerced confessions introduced on the Government's case in chief as evidence of guilt.

A. The court's findings at the suppression hearing

Prior to trial, on no specific ground, the defense moved to suppress any and all statements made by Diop to Government agents. At the suppression hearing, Diop denied that he had been advised of his right to counsel; denied that advice as to his constitutional rights was offered; admitted that at a certain point in time he "knew something was wrong" and was "amazed' 'at the events then transpiring. He also denied any meaningful comprehension of the arrest proceedings (S. 74, 105-06).[7] In short, Diop placed in sharp dispute the credibility of the three Government agents who testified at the suppression hearing by claiming, in essence, that the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were not duly administered and, if they were, he did not have sufficient knowledge of the English language to comprehend them.

While Judge Dooling opined that the case was "a surprisingly close one, he observed that the Court was not aided by Diop's "want of candor" (S. 128). He found that Diop dealt unprotestingly in comprehensible English with the Government agents. "The evidence is so overwhelmingly against it that it could not be found that he [Diop] is without English" (S. 129). Judge Dooling stated the hearing's sole issue to be whether Diop was sufficiently versed in English to deal with the occasion

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[7] Appellant attempted in vain to claim that he was deprived of counsel. Agent Giaimo testified that when Diop asked for a lawyer, he properly stopped his questioning (S. 52-53). Although Appellant's Brief states that the Court rejected the agent's testimony on this score, such is not the fact. The Court clearly ruled that in all likelihood that was true since Diop more than likely said the words "embassy, embassy," the Court interpreting that to probably be the equivalent of a request for counsel (S. 106, 136). In fact, Diop admitted he never requested a lawyer (S. 91).

of being asked to waive his right to stand silent and concluded by finding that the agents were not "alerted to the idea that the man's English was inadequate to the occasion" (S. 129). The Court reasoned that the agents had been "trapped" by Diop to the extent that "one could only have hoped that some rare sixth sense could have warned them that they'd better get someone in there who could talk to him in a tongue that he could better understand, because the whole plateau of comprehension required to the occasion had suddenly changed, moved up a thousand feet from the common commercial level" (S. 131-32).

The Court accordingly ruled that the Government had failed to meet its burden of establishing that appellant consciously waived a known constitutional right not to incriminate himself (S. 133). All statements to the agents were suppressed except for Diop's admission of ownership of the crate to Inspector Grabbatin. At that time, Judge Dooling stated, the Government did not know of or suspect the presence of controlled substances concealed in the crate. In the Court's eyes, the situation had yet to reach constitutional dimensions (S. 134-35).

Judge Dooling ruled, apparently in conformity with the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 459, 464 (1938), that the Government failed to meet its burden in establishing a waiver by demonstrating that Diop intentionally relinquished or abandoned a known right. Implicit in his conclusion was a finding that *prima facie* Diop's *Miranda* warnings were properly given. Indeed, the Court noted that its finding was based exclusively upon Diop's subjective state of mind (S. 135-36).[8]

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[8] "I must say the Government presented the issue on the Government's behalf as well as it could be presented. I wish in a way that the issue was one, if decided against the Government, the Government felt was dispositive, so it felt could have taken an appeal.

[Footnote continued on following page]

B. The court's jury charge

In light of its prior ruling suppressing appellant's post-arrest statements and in accordance with the mandates of *Harris* v. *New York*, *supra*, and *Oregon* v. *Hass*, *supra*, the District Court cautioned the jury that appellant's post-arrest statements were only to be considered in assessin ghis credibiliy. Specifically, the Court admonished:

> The Government has presented testimony concerning statements allegedly made by defendant at Kennedy Airport on November 7th and it has argued that what he there said contradicts or is inconsistent with his testimony here in court. You must determine whether you are satisfied that the defendant did make such statements, whether they are inconsistent with or contradictory of his testimony here.
>
> If you do find inconsistency or contradiction, you may consider that only in determining the defendant's credibility as a witness. Apart from the question of his credibility as a witness, you may not treat what you find Mr. Diop said at Kennedy Airport as evidence of what the facts are. You may treat it only as nullifying those parts of defendant's testimony here which are inconsistent or contradicted by what you find he said at Kennedy Airport (T. 339-340).

I'm very conscious that this point of subjective and objective test may not have been sharply brought out in any preceding case, and I would be a foolish man if I were to say to you that I have total confidence that my view of it has something, depending on defendant's subjective state of mind is critical and dispositive, but it seems to me that that's the nature of it, and in the absence of anything unreal about it, it would normally be decisive. . . ." (S. 135-36).

The Court further advised that:

> The Government has presented testimony concerning statements allegedly made by defendant at Kennedy Airport on November 7th after the crate and its bottom compartment had been opened, and it has argued that what he there said contradicts or is inconsistent with his testimony here in court. You must determine whether you are satisfied that the defendant did make usch statements and whether they are inconsistent with or contradictory of his testimony here. If you do find inconsist[e]ncy or contradiction, you may consider that only in determining the defendant's credibility as a witness. Apart from the question of his credibility as a witness, you may not treat what you find Mr. Diop said at Kennedy Airport after the crate and its bottom compartment had been opened as evidence of what the facts are. You may treat it only as nullifying those parts of the defendant's testimony here which are inconsistent with or contradicted by what you find he said at Kennedy Airport (T. 346-347).

By his instructions, Judge Dooling complied in all respects with *Harris* v. *New York*, *supra*, and *Oregon* v. *Hass*, *supra*. At no time did appellant request any charge regarding "voluntariness", either prior to or after the Court's instructions.[9]

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[9] We recognize that in *Barry* the Court held that such a charge was required even in the absence of a request. Concededly, if *Barry* applies here the same rule would follow.

C. The court was obligated to instruct the jury not as to the manner of determining the weight of Diop's admissions but solely the manner in which they could be utilized

In *Harris* v. *New York*, *supra*, the defendant was charged with twice selling heroin to an undercover police officer. The prosecution introduced evidence of the two sales. When Harris took the stand in his own defense he denied *in toto* the alleged first sale of narcotics and, as to the second, claimed the substance used at that sale to have been baking powder rather than heroin.

On cross-examination the prosecutor asked seriatim whether Harris made specific oral post-arrest statements to the police. Harris remembered none of the questions or answers recited by the prosecutor. In *Harris*, as here, the prosecutor made no attempt to use the statements in its case in chief, the statements having been inadmissible under *Miranda* v. *Arizona*, *supra*. At the Harris trial the prosecution conceded that no warning of a right to appointed counsel had been given to Harris prior to his custodial interrogation. Noting this, the Supreme Court observed that "[Harris] makes no claim that the statements made to the police were coerced or involuntary". *Id* at 224. Obviously, by so stating, the Court recognized that involuntariness is not tantamount to a *per se* violation of *Miranda*.

The *Harris* Court thereafter ruled that "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, providing of course that the trustworthiness of the evidence satisfies legal standards." *Id*. Reasoning from *Walder* v. *United States*, 347 U.S. 62 (1954), the Court constructed its holding for allowing such evidence to be used for impeachment purposes by observing:

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully

obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

"[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." (Citation omitted). *Harris* v. *New York*, *supra*, at 224.

As in *Harris*, Diop's testimony in his own behalf contrasted sharply with what he told government agents shortly after his arrest. Indeed, under his version of the story he made no such statements. The impeachment process in this case, as in *Harris*, "undoubtedly provided valuable aid to the jury in assessing . . . credibility, and the benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby". *Id.*, at 225. The deterrence on proscribed police conduct resulting from the exclusionary rule is satisfied, the Court wrote, so long as illegal evidence is made unavailable to the prosecution in its case in chief. Once Diop took the stand he was under "under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." *Id.*, at 225. Diop fell squarely within the justification for the *Harris* rule; his testimony had to be tested so that the shield provided by *Miranda* could not be used to prevent him from being confronted with prior inconsistent utterances. *Id.*, at 226. Accordingly, we view the Government's rebuttal presentation in this case as solely having been offered into evidence and received for one purpose—impeachment.

In *Oregon* v. *Hass*, *supra*, the defendant, while in custody after he had been charged with bicycle burglary

and had been given the warnings prescribed by *Miranda*, made various admissions to the police. Thereafter, while being transported in a police patrol car to the local station house, the defendant expressed his wish to telephone his lawyer. Subsequently, but prior to arrival at the police station, the defendant pointed out the place where he had left the bicycle he had stolen. At trial, the Court ruled that once Hass requested counsel, all subsequent statements were inadmissible. After Hass testified in his own defense and had materially altered the substance of the statements he had given to the police while in their vehicle, the prosecution called the arresting officer in rebuttal. As in *Harris*, the lower Court ruled such statements admissible for credibility purposes. The *Hass* Court saw no valid distinction between the case before it and *Harris* v. *New York*, *supra*.

Hass' statements, as Diop's, were made after he knew that the Government's opposing testimony had been ruled inadmissible for the prosecution's case in chief. The Court found that despite their inadmissibility on the case in chief, there was no evidence or suggestion that Hass' statements were involuntary or coerced. *Id.* at 722. As did Diop, Hass "properly sensed that he was in "trouble", but "the pressure on him was no greater than on any other person in like custody or under inquiry by an investigating officer." *Id.* at 723-24.

In *Harris* the *Miranda* warnings were improper while in *Hass* the warnings were entirely proper. Regardless of this factual distinction and the reason for the prior exclusion of evidence, the Supreme Court squarely held that the underlying rationale for inadmissibility would have the same effect: "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Id.* at 723.

We submit that in view of the above rules the sole purpose for which the Government was entitled to offer

its rebuttal evidence was strictly limited to Diop's credibility. Having been so offered, they were received solely for that purpose, as explained by Judge Dooling. Appellant, by now injecting the nonexistent issue of voluntariness, seeks to artfully thwart the evidentiary purpose of *Harris* statements by indirectly implying that an "incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn. *Harris*, *supra*, at 231 (Brennan, J., *dissenting*).

Within the framework of *Harris* and *Hass*, neither *Barry* nor 18 U.S.C. § 3501 is authority for the proposition that Judge Dooling was required to do anything more than he did.[10] Both the statute and *Barry* are distinguishable from the case at bar. 18 U.S.C. § 3501(a) states, in relevant part:

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[10] The Omnibus Crime Control and Safe Streets Act of 1968, which added Section 3501 to Title 18 of the United States Code, provides, inter alia, that a confession shall be admissible in evidence if it is voluntarily given even though all aspects of the *Miranda* warnings have not been given; that the district court must determine the issue of voluntariness outside of the presence of the jury; and that the trial judge in determining voluntariness shall taken into consideration all the circumstances, including the following : (1) time between arrest and arraignment; (2) whether the defendant knew the nature of the offense charged; (3) whether the defendant knew or was advised of his right to remain silent; (4) whether the defendant knew or was advised of his right to counsel; (5) whether counsel assisted the defendant during questioning. The section explicitly provides that the presence or absence of any of these factors need not be conclusive on the issue of voluntariness.

Section 3501(a) further provides that the confession shall be admitted in evidence if the trial judge determines that it was voluntarily made, but the jury shall hear relevant evidence on the issue of voluntariness and the trial judge shall instruct the jury to give such weight to the confession as the jury feels it deserves under the circumstances".

> Before such *confession* is received in evidence, the trial judge shall, out of the presence of the jury determine *any issue as to voluntariness* (emphasis added).

In *Barry*, during the course of the trial, the defense moved for suppression of certain statements made by Richard Barry to government agents. The statements were, to say the least, the equivalent of a full confession. Barry testified that he had been refused permission to call counsel despite repeated requests and claimed that his confession had been extracted through verbal threats and physical intimidation. *United States* v. *Barry*, *supra*, 518 F.2d, at 345. The District Court found that Barry had unilaterally decided to speak without counsel and, consequently, permitted the confession to be admitted into evidence in the prosecution's direct case.

The trial judge gave no instructions to the jury concerning the issue of voluntariness when the statements were admitted. Barry subsequently testified before the jury as to his version of the interrogation and later requested the Court to instruct the jury to disregard any admission which would not have been made but for a threat of harm. The Court denied the request, charged the jury and made no reference to the issues which flowed from the admission of the confession into evidence.

On appeal, Barry claimed that the provisions of 18 U.S.C. § 3501 mandated a voluntariness charge to the jury. In full agreement, this Circuit reversed the lower Court and held that the failure to so charge was plain error.

Chief Judge Kaufman, writing for the Court of Appeals, reviewed the legislative history of Section 3501. He wrote:

> The statute's unambiguous language is bolstered by the legislative history of § 3501. That

> section is a part of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, the major purpose of which, according to the report of the Senate Committee on the Judiciary, 1968 U.S. Code Cong. and Admin. News § 2112, was to prevent the "rigid, mechanical" exclusion from evidence of *voluntary* confessions solely because the police had not complied with what the committee called the "inflexible requirements of the majority opinion in the Miranda case." *Id.* at 2124, 2132. Congress did not, however, wish to achieve this objective at the price of permitting the unqualified admission of coerced confessions. To forestall this possibility, Congress designed safeguards for the accused. *United States* v. *Barry*, 518 F.2d at 347.

In his analysis, the Chief Judge reviewed the Committee Report which read:

> There is the added safeguard that the jury *must* be instructed to give the confession or statement the weight that they feel it warrants under all the circumstances. The committee feels that society is entitled to the use of confessions and incriminating statements which are admitted *only* after passing the tests of *both* court and jury under the above-described safeguards. The committee also feels that a civilized society could not be more fair to persons accused of crime, as the constitutional rights of defendants in criminal cases would be fully protected and respected by the safeguards in this proposed legislation. (citation omitted) [emphasis in original] *Id* at 347.

We submit that the motivating force behind the rationale of § 3501 was, as noted by Chief Judge Kaufman:

> to provide adequate protection against the use of coerced confessions . . . including a de-

> sire that the jury play a part in weighing the evidence of duress. This purpose would be subverted if, even in the absence of a proper objection, the jury were not specifically instructed as to the precise nature of its role. *Id.*

In *Barry* the jury was stripped of its role as the fact-finder since it was merely instructed "to determine what the facts in this case are". Thus, the trial Court erroneously failed to adequately instruct it as to the proper manner in which it should consider the evidence, in violation of the Supreme Court's admonition to guard against the gross unfairness when "the state . . . by coercion prove[s] its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U.S. 534, 540-41 (1961). See also *Lego* v. *Twomey*, 404 U.S. 477, 484-85 (1972); *Jackson* v. *Denno*, 378 U.S. 368, 385-86 (1964). Both the language of 18 U.S.C. § 3501 and the legislative history illustrate that 3501's enactment was designed to "exclude the issue of fairness in securing the confession, independently of its reliability, from the ambit of jury consideration." *Barry*, *supra*, at 348. Here the issue of fairness was resolved by Judge Dooling. Once the statements were ruled inadmissible for confession purposes, they were deemed, as a matter of law, to have been elicited in an unfair maner and consequently could not have been utilized by the Government as evidence in chief to prove Diop's guilt. From that point on, however, when Diop chose to testify, the guiding principles of *Harris* v. *New York* controlled. While voluntariness was a proper argument by appellant on summation, the Court was not legally bound to caution the jury regarding the evidentiary *weight* of the evidence but was solely committed to discuss its *use*.

We submit that an appropriate examination of the trial record could not under any circumstances reveal an evidentiary scintilla of Government coercion. Diop's

admissions were obviously the result of neither coercion nor duress.[11] Appellant's position throughout the trial was that he never made any post-arrest statements, not that they were the result of duress. Indeed in the suppression hearing at which Diop denied making any statements to the Government, as he did at trial, Judge Dooling stated that the reason the statements had to be suppressed was that Diop did not knowingly *waive* his constitutional rights, not that his statements were forced out of him. The statements having been introduced and received to prevent perjured testimony and to shed light solely on Diop's credibility, the protections of *Barry* were not triggered and hence did not attach at this stage of the trial. The Government was clearly not by coercion proving its charges out of Diop's mouth. Once Diop's statements were introduced on rebuttal as a

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[11] In writing for the Court in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1972), Justice Stewart illustrated the impossibility of defining "voluntariness" in the Fourteenth Amendment confession cases except in its proper context. He wrote:

> Those cases yield no talismanic definition of "voluntariness," mechanically applicable to the host of situations where the question has arisen. "The notion of 'voluntariness,'" Mr. Justice Frankfurter once wrote, "is itself an amphibian." *Culombe* v. *Connecticut*, 367 U.S. 568, 604-605. It cannot be taken literally to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if voluntariness incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind". It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness." *Id.*, at 224.

result of his flat denials of the Government's direct case, the controlling principles and purposes of *Harris* v. *New York* exclusively applied. Had the damaging statements been found admissible on the Government's direct case, then and only then would appellant have been entitled, without request, to the jury charge that he now contends should have been given. There was simply no compelling reason in law or in fact for the Court to act in a manner other than as it did.[12]

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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[12] The evidence of Diop's guilt, apart from the statements that he made, was shown by overwhelming evidence. Accordingly, and for that reason alone, we believe that this may very well be an appropriate case in which to preclude appellant from raising this matter on appeal. See *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723, 724 (2d Cir. 1974).

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That on the 31st day of August 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

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